**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| MARILYN MITCHELL,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (FRANCHISE TAX BOARD),<br><br>Respondent. | ) | Case No. S-CE-452-S<br><br>PERB Decision No. 954-S<br><br>October 21, 1992 |
| CALIFORNIA STATE EMPLOYEES ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (FRANCHISE TAX BOARD),<br><br>Respondent. | ) | Case No. S-CE-459-S |
| MARILYN MITCHELL,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (FRANCHISE TAX BOARD),<br><br>Respondent. | ) | Case No. S-CE-487-S |

Appearances: Carroll, Burdick & McDonough by Cathleen A. Williams, Attorney, for California State Employees Association; Department of Personnel Administration by Joan Branin, Labor Relations Counsel, for State of California (Franchise Tax Board).

Before Camilli, Caffrey, and Carlyle, Board Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees Association (CSEA) to the attached

proposed decision of an administrative law judge (ALJ). CSEA alleged that the State of California (Franchise Tax Board) (FTB) violated section 3519(b) of the Ralph C. Dills Act (Dills Act)[1], by interfering with its right to represent its members, when the FTB took specified actions against Marilyn Mitchell (Mitchell), a CSEA union chapter officer and job steward. The ALJ found that Mitchell and CSEA failed to establish that incidents alleged in three consolidated complaints interfered with or denied CSEA's rights.

The Board, after review of the entire record, including the transcript, exhibits, proposed decision, CSEA's exceptions, and FTB's responses thereto, finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself consistent with the discussion below.

## CSEA'S EXCEPTIONS

On appeal, CSEA contends that: (1) the ALJ erred in finding no interference with CSEA's rights under section 3519(b) of the Dills Act; and (2) it was improper for the ALJ to exclude from the hearing, evidence regarding allegations contained in an

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[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

adverse action taken against Mitchell involving a salary-reduction.

DISCUSSION

CSEA contends that, because the record contains examples of actions taken by FTB that violated Mitchell's rights to engage in protected activity, FTB has also interfered with or denied CSEA its rights.[2] In other words, where a violation of section 3519(a) occurs and involves a union official, a violation of section 3519(b) is presumed. In support of this position, CSEA relies on Carlsbad Unified School District (1984) PERB Decision No. HO-U-224, a non-precedential ALJ proposed decision.

We reject this argument. The ALJ in this matter followed the proper approach for determining whether an independent violation had occurred under section 3519(b). As the ALJ stated, "The separate and independent Dills Act section 3519(b) allegation is more than a mere technicality." Mitchell and CSEA are required to establish a denial of CSEA rights, separate and apart from the harm allegedly suffered by Mitchell, and deferrable for resolution under the collective bargaining

[2]The hearing before the ALJ was held pursuant to three complaints alleging violations of section 3519(b) of the Dills Act. The complaints were based on 37 specific measures taken by FTB against Mitchell. As a result of preliminary procedural rulings, the parties agreed to structure the order of proof. The initial hearing addressed whether the 37 alleged incidents of FTB conduct toward Mitchell interfered with or denied CSEA's rights. If a negative impact had been demonstrated, a second hearing would have been scheduled to consider whether the alleged acts occurred and any justification or affirmative defenses set forth by FTB. For the initial hearing and proposed decision, all 37 allegations in the complaints were deemed true.

agreement.[3] To establish a violation of 3519(b) under these circumstances, a charging party must show actual denial of the union's rights under the Dills Act. A showing of theoretical impact is insufficient.

CSEA details sixteen areas in which it asserts that Mitchell and CSEA met their burden of demonstrating harm to representation rights. The majority of the allegations merely describe harm to Mitchell as an employee or as a job steward which is properly deferrable to binding arbitration. As stated, such harm does not form the basis for an independent denial of CSEA's right to represent.

CSEA also contends the record contains testimony establishing that it suffered harm because the actions by FTB intimidated individuals other than Mitchell from union participation.[4] Such an allegation, if proven, could be the

[3]CSEA and the state were parties to a collective bargaining agreement which prohibited employer reprisals against employees and job stewards and which entitled employees/job stewards/union officers to reasonable release time and stewards to the use of state telephones.

[4]In May of 1990, Mitchell sent an open letter to a group of public and CSEA officials. It was also widely disseminated throughout FTB. The letter listed many alleged FTB actions which included threats against Mitchell for union involvement. With regard to the letter, the ALJ concluded that "Any harm and/or controversy sustained by the union cannot be attributed to FTB, but must be attributed to Mitchell as the source of the letter." We do not agree. The source of the information that the employer has discriminated against or interfered with an employee's exercise of protected activity is irrelevant to the determination of harm. An employer may not absolve itself simply by being silent about the discriminatory act. If an employer acts illegally, the resulting harm to the union cannot be blamed on those who broadcast information describing the actions. However, the burden remains on the charging party to establish that actual harm has occurred.

basis for a violation. However, CSEA did not carry its burden. CSEA relied heavily on uncorroborated hearsay and testimony by individuals claiming to have been intimidated by actions against Mitchell but whose testimony demonstrates significant other factors affecting their levels of union participation. Such testimony was equivocal, not persuasive and insufficient to carry the burden of proof. Accordingly, independent harm to CSEA's right to represent was not established. Therefore, this exception is rejected.

CSEA also contends that it was improper for the ALJ to terminate Mitchell's case regarding a salary reduction. In the proposed decision, the ALJ states, at page 56:

> The two adverse actions against Mitchell were timely appealed to SPB, the appropriate forum for deciding whether the factual allegations constitute cause for discipline. (Fn. omitted.) The January 1991 demotion is pending before the SPB and Mitchell withdrew her appeal from the June 1990 salary reduction, thereby terminating the case.

CSEA contends that the ALJ, in effect, ruled that Mitchell was required to exhaust her administrative remedies regarding the 1990 salary reduction through the State Personnel Board (SPB) or that withdrawal of her appeal resulted in the application of collateral estoppel in this proceeding before PERB. According to CSEA, the ruling prevented Mitchell and CSEA from presenting evidence regarding the allegations contained in the adverse action.

CSEA reads too much into the ALJ's statement regarding the status of the SPB action. No allegation was dismissed on the

basis of either failure to exhaust administrative remedies or collateral estoppel. Rather, certain allegations were dismissed and properly deferred to the contractual grievance procedure. The remaining allegations were dismissed because Mitchell and CSEA failed to demonstrate that CSEA had suffered a denial of its rights under the Dills Act. Had the allegations not been dismissed, the propriety of actions taken against Mitchell and the validity of any defenses would have been tested in a later hearing. Accordingly, this exception is without merit.

**ORDER**

The unfair practice charges and complaints in Case Nos. S-CE-452-S, S-CE-459-S and S-CE-487-S are hereby DISMISSED.

Members Caffrey and Carlyle joined in this Decision.

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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|---|---|---|
| MARILYN MITCHELL,<br><br>Charging Party,<br><br>v.<br><br>**STATE OF CALIFORNIA (FRANCHISE TAX BOARD),**<br><br>**Respondent.** | ) | Unfair Practice<br>Case No. S-CE-452-S |
| CALIFORNIA STATE EMPLOYEES ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (FRANCHISE TAX BOARD),<br><br>Respondent. | ) | Case No. S-CE-459-S |
| MARILYN MITCHELL,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA (FRANCHISE TAX BOARD),<br><br>Respondent. | ) | Case No. S-CE-487-S |

**PROPOSED DECISION**
**(1/10/92)**

**This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.**

Appearances: Cathleen A. Williams, Esq., Carroll, Burdick & McDonough, for Charging Parties Marilyn Mitchell and California State Employees Association; M. Jeffrey Fine, Deputy Chief Counsel, and Joan Branin, Labor Relations Counsel, Department of Personnel Administration, for Respondent State of California (Franchise Tax Board).

Before Christine A. Bologna, Administrative Law Judge.

## PROCEDURAL HISTORY

These consolidated unfair practice cases allege denial of an employee organization's rights under the Ralph C. Dills Act (Dills Act) as a result of actions concerning a union chapter officer and job steward. The employer asserts a lack of jurisdiction based on deferral to arbitration.

On June 13, 1990, Charging Party Marilyn Mitchell (Mitchell) filed an unfair practice charge (Case No. S-CE-452-S) against the State of California (Franchise Tax Board) (Respondent or FTB); after two amended charges, on February 27, 1991, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging a violation of section 3519(b)[1] of

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[1]Unless otherwise indicated, all references will be made to the Government Code. The Ralph C. Dills Act is codified at section 3512 et seq. and is administered by PERB. In pertinent part, section 3519 provides that:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

the Dills Act based on 22 specified incidents. The general counsel dismissed the section 3519(a) allegation based on deferral to arbitration but refused to dismiss the section 3519(b) claim on the same grounds. Respondent filed a timely answer on March 18, claiming a lack of PERB jurisdiction under Lake Elsinore School District (1987) PERB Decision No. 646, aff'd. Elsinore Valley Education Association, CTA/NEA v. PERB (1988) Cal.App.4th, Div.2, Case No. E005078 [nonpubl. opn.], given dismissal of the (a) charge based on identical allegations, and asserting a lack of particularity as to the alleged harm or rights denied to Mitchell's employee organization. An informal settlement conference conducted by a PERB administrative law judge (ALJ) on March 26, 1991, did not resolve the dispute.

On July 19, 1990, Charging Party California State Employees Association (CSEA) filed an unfair practice charge against the same Respondent (Case No. S-CE-459-S); on January 17, 1991, after two amendments, the general counsel issued a complaint alleging a violation of Dills Act section 3519(b) by an adverse action taken against Mitchell. On January 25, FTB filed a timely answer, asserting that certain allegations occurred outside the six-month statute of limitations in the Dills Act,[2] and further that

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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

[2]Dills Act section 3514.5(a) provides:

the complaint failed to specify how and when CSEA was denied statutory rights. The informal conference held by a PERB ALJ on February 6, 1991, did not settle the matter.

On March 27, 1991, Mitchell filed a second unfair practice charge against FTB (Case No. S-CE-487-S); on April 25, the general counsel issued a complaint alleging that Dills Act section 3519(b) was violated by 15 actions of Respondent toward Mitchell. Mitchell withdrew the section 3519(a) and (c) allegations and four specific factual contentions, and the General Counsel refused to dismiss and defer the (b) claim. On May 15, FTB filed a timely answer, asserting a lack of jurisdiction under Lake Elsinore School District, supra, PERB Decision No. 646, given contract coverage of the charges. The parties waived a third informal conference before a PERB ALJ to expedite the case for formal hearing.

The three consolidated complaints allege that FTB took 37 specific measures, including two adverse actions of salary

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. . . . . .

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . .

reduction and permanent demotion, against Mitchell, the CSEA district council president and job steward for FTB employees, from January 1990 through March 1991.[3]

A prehearing conference was conducted on April 2, 1991, by telephone. An order consolidating the three cases for formal hearing issued April 26.

On March 18, 1991, Respondent filed a motion to particularize the complaint in Case No. S-CE-459-S, based on PERB regulations 32615(a)(5) and 32640(a)[4] (tit. 8, Cal. Code of Regs., secs. 32615(a)(5) and 32640(a).) CSEA filed three responses to the motion on August 2, July 12 and August 5, respectively. On August 2, FTB replied, stating that CSEA's responses were insufficient, and moved for dismissal of the complaints. On August 9, CSEA filed its opposition to dismissal.

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[3]The statute of limitations for all allegations commenced January 1990.

[4]PERB regulation 32615(a)(5) requires a charge to contain a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. PERB regulation 32640(a) provides:

> . . . The complaint shall contain a statement of the specific facts upon which Board jurisdiction is based, including the identity of the respondent, and shall state with particularity the conduct which is alleged to constitute an unfair practice. The complaint shall include, when known, when and where the conduct alleged to constitute an unfair practice occurred or is occurring, and the name(s) of the person(s) who allegedly committed the acts in question. . . .

At the start of the formal hearing, the ALJ granted Respondent's motion to particularize, requiring Charging Parties to demonstrate that the 37 specified allegations had an effect upon, harmed or otherwise denied CSEA's statutory rights under section 3519(b) of the Dills Act. The ALJ denied FTB's motion to dismiss the complaints; although the applicable contract prohibited reprisals by CSEA and the state against employees for exercising Dills Act rights, and also precluded the state from taking reprisals against job stewards, no clause in the agreement barred or otherwise spoke to conduct denying or interfering with CSEA's rights. Respondent also moved to dismiss certain allegations of the complaint in Case No. S-CE-452-S, contending that an authorized representative of both Charging Parties had agreed to drop those claims after meeting with FTB counsel over particularization. The motion was denied, due to Mitchell's filing of an amended notice of appearance which designated her as co-counsel in Case Nos. S-CE-452-S and S-CE-487-S, before the subject meeting, and because Mitchell did not join in the dismissals. Both motions to dismiss were denied without prejudice to renewal after the evidentiary hearing.[5]

As a result of the preliminary procedural rulings, the parties stipulated to structure the order of proof. Evidence was

[5]The parties also filed cross-motions to quash each other's subpoena duces tecum. CSEA's motion to quash FTB's subpoena duces tecum was denied, and documents dating from January 1, 1990 - April 1, 1991, were ordered to be produced and sealed with the file. FTB's motion to quash CSEA's subpoena duces tecum was granted in part and denied in part, subject to the same limitations.

presented[6] as to how the 37 alleged incidents of FTB conduct toward Mitchell intimidated other employees from involvement in the union, prevented representation of employees by CSEA, and harmed or otherwise denied CSEA's rights under the Dills Act. Charging Parties were required to demonstrate an adverse effect upon CSEA's rights for each claim. If a negative impact upon the union's rights was shown, a subsequent evidentiary hearing would consider whether in fact the alleged act(s) occurred, with Respondent presenting affirmative defenses, such as business necessity or other justification. The focus of the hearing was whether the allegations, if true, demonstrated a violation, interference, or denial of CSEA's rights by a preponderance of the evidence.

Formal hearing was held on August 12, 13, 14, 15 and 16, 1991, in Sacramento, California.[7] With the filing of post-hearing briefs, the matter was submitted for determination of the bifurcated section 3519(b) allegations on October 21.[8] Formal hearing on the claims demonstrating adverse impact on the union's rights is scheduled for February 24-26, 1992.[9]

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[6]Witnesses were sequestered.

[7]On May 16, 1991, Charging Party CSEA requested a continuance of the hearing based on retention of new counsel to represent CSEA and Mitchell. Respondent agreed to continue the hearing and hold the case in abeyance due to the pending expiration of 21 state contracts.

[8]By stipulation, the briefing schedule was extended to October 18, 1991. Only Respondent filed a post-hearing brief.

[9]The phase two hearing has been continued three times.

## FINDINGS OF FACT

Charging Party Mitchell is a state employee within the meaning of Dills Act section 3513(c). Charging Party CSEA is an employee organization under Dills Act section 3513(a), and the exclusive representative of several appropriate units of FTB employees within the meaning of section 3513(b) of the statute.[10] Respondent is a state employer under Dills Act section 3513(j).

Applicable Contract Language

The 1988-1991 unit 4 agreement between the State of California and CSEA applied to Mitchell as a rank and file unit 4 employee. Article 6 contains a grievance procedure which ends in final and binding arbitration; either an employee or CSEA may file a grievance but only CSEA may submit the grievance to arbitration (secs. 6.2 and 6.12).

Article 2 (Union Representational Rights) requires CSEA to furnish a written list of union stewards, broken down by units and designated area of primary responsibility, to each state department and to the Department of Personnel Administration (sec. 2.1).[11] The state must recognize and deal with CSEA job stewards, elected bargaining unit council representatives and

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[10]Section 3513(b) of the Dills Act defines a "recognized employee organization" as an employee organization recognized by the state as the exclusive representative of employees in an appropriate unit. CSEA represents approximately 2,500 FTB employees in several bargaining units; the largest is unit 4 (Office and Allied).

[n]Section 2.1 defines a steward's area of primary responsibility as an institution, office or building. Stewards also may be assigned an area of primary responsibility which covers several small offices or buildings within close proximity.

union staff on discipline, contract administration, PERB proceedings, matters before the State Personnel Board (SPB) and Board of Control, and certain statutory appeals (sec. 2.1).

With advance notice, CSEA representatives have access to employees which does not interfere with state work; where restrictions are imposed, reasonable accommodations are required (sec. 2.2). Job stewards are entitled to reasonable use of state phones for representation which does not interfere with state operations, so long as there are no additional charges (sec. 2.3). Distribution of union literature is authorized in non-work areas during non-work time (sec. 2.4). State facilities may be used for union meetings with advance notice and subject to the operating needs of the state (sec. 2.5).

Union stewards are allowed reasonable paid time off during working hours for representation, provided the employee represented is in the steward's department and designated area of primary responsibility; release time is subject to prior notification and approval by the steward's supervisor (sec. 2.6). Employees are entitled to reasonable paid time off during work time to confer with union representatives on representational matters at the site, subject to approval of the employee's supervisor (sec. 2.7).

The state is prohibited from imposing or threatening reprisals, discrimination, interference, restraint or coercion upon union stewards because of the exercise of their rights under the contract (sec. 2.8). Article 5 bars both the state and CSEA

from imposing or threatening reprisals, discrimination, interference, restraint or coercion against employees because of their exercise of rights under the Dills Act or the contract (sec. 5.5).

Article 8 governs leaves. A department may approve sick leave only after ascertaining that the absence is for an authorized reason. The state may require the employee to subject substantiating evidence, including but not limited to a doctor's certificate; if the supporting evidence is not adequate, the request for sick leave is disapproved (sec. 8.2).[12]

The union leave clause gives CSEA a choice of requesting a paid or unpaid leave of absence for a union bargaining council member, steward or chief job steward; union leave is granted at the discretion of the department and CSEA reimburses the state for the employee's salary and benefits (sec. 8.6). A department also may grant an unpaid leave for up to one year for union activity (sec. 8.7). • The state must provide reasonable paid time off for a reasonable number of employees to attend SPB hearings during work hours, upon advance notice of two workdays, where the employee is a party or is specifically affected by the results of the hearing and is scheduled to testify; the state must try to accommodate a shift change request for an employee working a graveyard shift on the day of a SPB hearing (sec. 8.10).

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[12]Medical verification of sick leave for up to two consecutive days is not required except where the employee has a demonstrable pattern of sick leave abuse, an above-average use of sick leave, or the supervisor believes the absence was for an unauthorized reason.

Upon request by CSEA or an employee, the state must consider the feasibility of establishing flexible work hours. Employees approved for a flexible work schedule are required to comply with reasonable procedures established by the department (sec. 19.5).

FTB Operations

FTB employs approximately 4,000 employees in Sacramento at several sites. More than half work at the Central Office on Butterfield Way. The Sun Center facility, which includes two buildings, Sun Center and Business Park, is a 20-minute drive away. In the spring of 1990, the FTB reorganized and certain units were relocated from the Central Office to Sun Center.

Mitchell works in unit 07 (Complex Document Resolution) at the Central Office. The unit consists of 12-24 staff depending on seasonal workload. The three unit supervisors' desks are at the head of each two rows of employees, separated from the workers' desks by an aisle.[13] The four unit telephones are on the supervisors' desks.[14]

CSEA Activity at FTB

From 1989 through 1991, CSEA conducted regular informational meetings in the FTB employee break room on a biweekly or monthly basis. At these meetings, union representatives distributed CSEA

[13]Only two supervisors worked in the unit from January through May 1990.

[14]The Office Service Supervisor Is, including Nancy Eiserman (Eiserman), report to Office Services Supervisor Wendy Naismith (Naismith). Naismith reported to Assistant Section Manager Jackie Lewis (Lewis) until Lewis left the unit. Lewis reported to Section Manager Michael Alberti (Alberti). Alberti reports to Bureau Director Van Ogden (Ogden).

literature, such as "Know Your Rights" pamphlets and brochures describing employee benefits. Employee job stewards, chapter officers and/or CSEA staff spoke to individual employees and made group presentations. The meetings were held from 11:00 a.m. to 2:00 p.m. to cover lunch periods and afternoon breaks. Attendance ranged from 50 to 200 people passing through. Mitchell, CSEA Field Representative Douglas Moffett (Moffett), and William Harris (Harris), a job steward and bargaining unit council representative, generally remained throughout the meetings while other stewards/officers attended during their lunch and/or break times. Mitchell and Moffett generally organized these informational meetings.[15]

During the same two year period, the CSEA local chapter held monthly meetings after work which covered organizing, recruitment, representation and training. Mitchell organized these meetings. In 1991, chapter meetings were held less often than in 1989 and 1990.

Since 1989, 10 to 12 job stewards have represented CSEA at FTB worksites in Sacramento. The FTB employee phone book contains a list of CSEA stewards; it is updated every three to six months. In addition to Mitchell, Harris and Kerns, job

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[15]Diane Kerns (Kerns), a job steward and chief job steward from October 1990 through May 1991, noticed that employee attendance at informational meetings was lower than usual in the summer of 1990. When she mentioned this to Moffett, he scheduled more meetings at different sites and distributed additional CSEA materials.

stewards included Brenda Hicks (Hicks),[16] who was the chapter secretary-treasurer, Greg Jefferson (Jefferson), Patty Rowland (Rowland), Ron Mattox, Gary Bryant, Danny Schultz, Manuel Vasquez and Pat Minor.[17] Hicks, Kerns, Jefferson and Danny Schultz are or were stewards at Sun Center. The remaining stewards work at the Central Office.

Hicks represented employees in two informal grievance meetings per week from 1989 to 1991. She had the use of two phones for representational activity during working hours. Hicks was never denied access to a worksite or an employee; all her requests to provide representation were granted. Kerns was a very active chief steward. In January 1991, she telephoned Mitchell three to four times a day on union business concerning 17 grievances. When Kerns was chief steward, none of her requests to represent employees were denied, and she was allowed all time necessary for representation when Mitchell was absent from work. Harris spent two to five hours per week on union business, including eight to ten telephone calls, on state and non-state time. According to Harris, CSEA chapter membership increased eight to nine percent in 1990 and went up again in 1991.

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[16]Harris, Hicks and Kerns were promoted to Program or Office Technician positions after becoming job stewards.

[17]Pat Minor was later replaced by Linda Peterson. Sharron (Sam) Rogers (Rogers) was a job steward for FTB supervisory employees for ten years until she resigned in May 1991.

Moffett has been assigned full-time to the FTB chapter since early 1989. He visits the Central Office and Sun Center three to four times a week.[18] Moffett and/or Mitchell filed eight to twelve grievances on Mitchell's behalf in 1990. Moffett met with FTB management 10-20 times concerning Mitchell in 1990. He also represented 100 other employees that year.

Background Facts re Marilyn Mitchell

Mitchell is a long-time CSEA activist. First appointed as a job steward in 1986, she served as chief job steward at FTB from 1987 through 1989, from January through May 1990, and from June 1991 to present. She has been very visible at the worksite in representational matters, filing 50 grievances in her first year as a steward. Until 1990, Mitchell's area of primary responsibility as a steward included all FTB buildings except the warehouse and downtown locations.[19]

Mitchell was the elected vice-president of CSEA Chapter 777 from 1986 to 1989. In late 1988, Mitchell and Hicks co-founded a chapter exclusively for FTB employees. Mitchell was elected as the first president of CSEA District Labor Council (DLC) 786, and has held this office ever since. The DLC president is a voting officer within the CSEA civil service division. Otherwise, the

[18]Moffett was reassigned to a different program from January to March 1990. Another CSEA field representative was assigned full-time to the FTB chapter during those two months.

[19]Mitchell testified that in 1990, Lewis limited her area of primary responsibility to the Central Office, citing the unit 4 contract.

posts of DLC president and job steward are co-extensive, according to Mitchell.

In 1989, Mitchell worked eight-hour day shifts from 6:00 a.m. to 2:30 p.m. in the first half of the year and from 7:00 a.m. to 3:30 p.m. for the remainder. She spent 30 to 50 percent of her time at work on union business. Her 1989 attendance records reflect 444 hours of absences, 24 credited to union leave. Mitchell recorded 44 meetings, lasting from 30 minutes to 2 hours, and 45 telephone conversations, ranging from 15 to 45 minutes, on the 1989 FTB job steward time reporting log sheets.

In 1990, Mitchell engaged in less union business at work, 10 percent of her time on site. She worked an eight-hour day from 6:00 a.m. to 2:30 p.m. from January until May 4, 1990. From May 7 until October 1, Mitchell was absent from work on nonindustrial disability leave (NDI) due to stress. She returned to work in October and worked the same shift. From November 2 through December 31, Mitchell worked a four-hour day from 8:00 a.m. to noon, with the remaining four hours credited to NDI. Her 1990 attendance records disclose 586.4 hours of absences, 87.5 hours attributed to union leave. Mitchell's steward logs reflect 22 meetings (15 minutes to 2 1/4 hours in length) and 42 telephone conversations (15 minutes to 1 1/2 hours duration).

In 1991, Mitchell worked an eight-hour shift from 7:00 a.m. to 3:30 p.m. from January 1 through March 22. Since then, she has been absent from work on NDI leave. Mitchell spent 10

percent of her work time on union business from January through March. Her 1991 attendance records reveal 200 hours of union leave (February 11 to March 15) and 23 additional hours of used leave time. Mitchell's steward logs show 11 meetings (15 minutes to 1 1/3 hours duration) and 22 telephone conversations (15 minutes to 2 hours in length).

In January 1990, Mitchell was a ten-year FTB employee in the civil service classification of Tax Program Assistant (Range C). That month, Eiserman became Mitchell's supervisor. On January 18, Eiserman signed Mitchell's annual performance report for the period ending October 1989. Mitchell received a favorable rating, commending her knowledge and expertise.

In March 1990, Mitchell was placed on 100 percent review, which required examination of her work by one to five coworkers. Mitchell was placed on attendance restriction in April, but the restriction did not apply when she worked a four-hour day in November and December.

In mid-June 1990, FTB took adverse action against Mitchell, reducing her salary by two steps (10 percent) from July 1 through September 30, based on conduct from January 1989 through June 1, 1990. The SPB hearing in Mitchell's appeal was held on October 2 and continued to May 1991. Moffett and CSEA Field Representative Karen Cole represented Mitchell at the SPB

hearing. Mitchell withdrew her appeal from the adverse action in February 1991.[20]

On January 9, 1991, Mitchell received a second adverse action, permanently demoting her to Tax Program Assistant (Range B), effective January 31, for conduct from October through December 10, 1990. She filed a timely appeal and the matter is now pending before the SPB.

Interaction With Coworkers

In January or February 1990, Eiserman, Lewis and/or Naismith allegedly informed Mitchell on two occasions that Eiserman had to restrict previously approved leave time for other unit 07 employees due to Mitchell's absences from work on union business. Mitchell did not verify these statements with her coworkers and no unit 07 employee complained to her about denial of approved leave. Mitchell's union activity did not change in character or degree as a result of these communications. She tried to complete her work so that no open cases required reassignment in her absence. On April 9, Moffett filed a grievance in CSEA's name on behalf of Mitchell over these discussions, citing

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[20] The withdrawal of appeal filed with the SPB was written and signed by Moffett. It was also signed by Mitchell, following a statement that she was fully informed of her rights and had not been denied representation by CSEA. The withdrawal did not admit any misconduct by Mitchell.

Articles 2.8, 4(b) and 5.5 of the unit 4 contract.[21] (Case No. -S-CE-452-S, paragraph 4(j).)

On March 20, 1990, Geneva Hebert (Hebert), a FTB unit 07 employee and CSEA member, filed a complaint against Mitchell at the CSEA Sacramento headquarters. Frank Guilelmino (Guilelmino), Moffett's supervisor, referred Hebert to Moffett. Hebert had a vaguely worded written document containing 10 signatures. She was concerned about Mitchell's time on the unit phone and absence from the worksite on union activities. Hebert told Moffett that Mitchell was not doing her fair share of unit work, and that Mitchell's attitude and tone of voice toward her supervisors were inappropriate. Moffett explained Mitchell's role as a steward and DLC president, and suggested a unit-wide meeting. Hebert was not satisfied. After Hebert left, Moffett called Mitchell and informed her about the meeting. The April 9 grievance filed by Moffett also alleged that on March 20, after Mitchell had left the worksite on approved union leave, Lewis, Naismith, Eiserman and Hebert called a unit-wide meeting on state time to circulate a petition to remove Mitchell from the unit and her position as job steward.[22] As a result of this alleged meeting, Mitchell was more cautious in her conversations with unit 07 coworkers, her

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[21]Article 4 is a broadly worded management rights clause, enabling the state to make reasonable rules and regulations consistent with the agreement.

[22]Moffett testified that Mitchell was the source of this claim, and that Hebert did not mention any unit-wide meeting in their March 20 conversation. Mitchell testified that Moffett and two unit 07 coworkers, Cheryl Woltman (Woltman) and Pam Morris (Morris) informed her about the meeting.

telephone calls, and where she placed documents when leaving the unit for representational activities. (Case No. S-CE-452-S, paragraph 4(a).)

On Friday, May 4, 1990, Mitchell telephoned Bureau Director Ogden after leaving work for an offsite union meeting. She asked Ogden to intervene and stop the one-on-one training between Mitchell and unit 07 coworker Karen Chamberlain (Chamberlain), scheduled on the following Monday, May 7. Mitchell reminded Ogden that she had a past history of conflict with Chamberlain.[23] Mitchell also complained to Ogden about restrictions on her use of the telephone, denial of adjusted time and 100 percent review of her work. Mitchell told Ogden that the training and selected trainer were reprisals for her previous grievances; she claimed that he would not help her because of Hicks' workers compensation case.[24] Ogden allegedly told Mitchell that he had received complaints from employees that she engaged in more union activity than FTB work, and that she should decide between her FTB job and her union job. Ogden confirmed the telephone conversation in writing, advising that he had met with unit supervisors and was satisfied that the scheduled training was not unusual and would help improve her job performance. Once Mitchell received his

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[23] When Eiserman became Mitchell's supervisor, Mitchell informed her of the interpersonal conflict with Chamberlain. According to Mitchell, Eiserman assured her that the two would not have to work together.

[24] Mitchell testified that Ogden was required to admit guilt in the workers compensation proceeding.

memo, a grievance was filed. As a result of the conversation with Ogden, Mitchell was more careful about the time she spent in representation, including time on the telephone. (Case No. S-CE-452-S, paragraphs 4(b) and (c).)

Mitchell did not return to work on May 4 and did not participate in the scheduled training with Chamberlain as she began her NDI leave on May 7, 1990. She did not return to the worksite until October 1, except for one May 7 meeting at which she represented herself in a pending grievance. Mitchell also attended one CSEA civil service division meeting while on NDI. She had daily conversations with stewards and employees concerning representation in May, and representation-related telephone calls several times a week during the remainder of her leave. While on leave, Mitchell did not represent any employees in meeting with management. Nor did she organize any chapter or informational meetings. After receiving the adverse action in June, Mitchell did not attend any CSEA meetings.

The Open Letter

On May 13, 1990, while on NDI, Mitchell sent an open letter to 100 individuals, including Assembly Members Gwen Moore and Phil Isenberg, Assembly Speaker Willie Brown, Senate Majority Leader David Roberti, Congressman Robert Matsui, State Controller and FTB Member Gray Davis (Davis) and FTB Executive Officer Gerald Goldberg (Goldberg). The letter was also forwarded to CSEA officials, staff and members, including General Manager Eugene Preston, Civil Service Administrator Tut Tate (Tate),

Guilelmino, Moffett, and civil service division stewards and officers employed at FTB and other departments.

Mitchell mailed the letters to employees' homes and state officers' work addresses at her own expense.[25] She did not consult with anyone in CSEA before sending the letter. Mitchell testified that she was authorized as a job steward and union officer "to do whatever it takes to resolve employee problems."

The open letter listed 28 issues, alleged FTB actions, policies and practices, including the use of state time and facilities for union busting. The letter named Ogden, Alberti, Lewis, Eiserman and Naismith, and stated that they told Mitchell she would be terminated if her union involvement, representation of other employees and campaign for employee rights did not stop. The letter also identified Goldberg and Davis as responsible for the wrongdoing.

Mitchell's open letter sparked a firestorm of controversy at FTB.[26] Many copies were circulated at the workplace. Harris

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[25]The letter identified Mitchell as DLC 786 president and a job steward, and bore a CSEA logo and caption. The address and phone numbers on the letter were Mitchell's.

[26]The letter contained the following excerpts:

> The common criminal has more protection and rights than the average State Employee. . . .
>
> We the State Workers of California are an oppressed people, we live under a fancy type of slavery, because unless we cow down to and kiss up to the power of state supervision/management, we might have to face no money for the six months fight, we would have to watch our kids go hungry for six months, we would lose our houses, our cars,

was "literally mobbed by employees," asking how the union could issue such a letter. He told employees that the letter represented Mitchell's opinions, was not an official CSEA letter, and encouraged employees to talk to Mitchell for further details. Five or six of Mitchell's unit 07 coworkers, some of whom were CSEA members, complained to Harris that Mitchell was not doing her job because she was always on the phone or away from the worksite. Harris did not discuss the letter with FTB supervisors or managers. He testified that one or two CSEA members resigned as a result of the letter but five employees joined the union.

Hicks had numerous discussions with FTB employees over the open letter. There was talk of renting a bus to go to CSEA

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> and everything we have worked so hard to obtain.
>
> It's time for Californians to speak up and out against the slave masters called state management and bring them to the same level as the rest of us, and make them personally accountable for their abusive actions. . . .
>
> FTB is constantly putting out news articles about how good life is in the workplace and how good and warm the relationships are between rank and file and management, but don't you believe it, it is all pure propaganda hype to fool the outside public. . . .

[27]Kerns copied the letter and distributed it at work. Eight employees told her that their decision to become a CSEA member or steward had been affected by the letter. Kerns considered their comments to be a loss of eight steward recruits; she did not name these individuals and none testified. Kerns also testified that her steward activities, such as use of the phone, ability to consult with co-workers at her desk, and recording of job steward activity, were restricted for an unspecified period of time proximate to the circulation of the letter.

headquarters to see what the union would do about the charges, followed by a rally at the State Capitol.[28] Due to the "flurry of activity" at FTB, both Hicks and Harris increased their representation and union-related activities as employees had many questions for them. Hicks received a mixed reaction from employees over the letter; some were shocked that Mitchell went to "this extreme" but others were very proud that she "told it like it is."

The open letter was a constant topic of conversation among the CSEA job stewards at FTB. Although the stewards were very concerned about any "fall-out" from the letter, none resigned. After the letter, Jefferson was contacted by more than ten employees requesting investigations into workplace problems. Eight to ten supervisors requested representation from Rogers. Rowland's knowledge of Mitchell's problems had no effect on her steward activity; she continued to refer all grievances to Mitchell, Moffett and/or Hicks because of their expertise and her own irregular work hours as a permanent intermittent employee.

FTB demanded a retraction of Mitchell's letter from CSEA. On May 24, 1990, Tate advised FTB Labor Relations Officer (LRO) Rick Mitchell (R. Mitchell) that CSEA had not given prior authorization for the open letter; Tate further stated that CSEA would conduct a full investigation into Mitchell's allegations against FTB management as well as FTB's concerns about a contract violation concerning employee home addresses. On June 3, the

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[28] These plans did not materialize.

CSEA civil service division created a special task force to investigate and report within a month.

Following the open letter, Mitchell received 35 oral and written responses at home, to which she replied by phone. On June 8, 1990, Mitchell received a petition signed by 26 individuals in her post office box; 11 were unit 07 coworkers, , six were FTB employees and nine were unknown to her.[29] Hebert brought the petition[30] to CSEA headquarters and met with Moffett and Guilelmino, claiming that the petition showed how unhappy employees were over the open letter. Moffett informed Mitchell of this meeting.

On June 14, 1990, Mitchell responded to the employees signing the petition whom she could identify, explaining her reasons for sending the open letter. She also sent out a follow-up letter in June, indicating that the response to the open letter was "fantastic" and asking for further help in identifying specific employee concerns.

[29] The unit 07 employees signing the petition included Chamberlain, Hebert, Morris and Woltman.

[30] The petition stated:

> In response to a second open letter, received by state employees on 5/29/90, we the undersigned feel compelled once again to let it be known that Marilyn Mitchell does not in any way represent us in regards to working conditions at Franchise Tax Board or any other matter concerning California state service. It should also be known that Ms. Mitchell's complaints stem from personal problems brought on herself and do not reflect normal proceedings at Franchise Tax Board where she is currently employed.

The June 1990 adverse action mentioned the open letter twice, alleging that it contained false statements causing discredit to FTB and implied authorization by a recognized union when the letter reflected only Mitchell's personal opinions. The adverse action was signed by Will Bush (Bush), FTB Assistant Executive Officer. Mitchell and/or Moffett requested a meeting with Bush over these charges but the request was denied. As a result of the open letter, responses thereto, the petition opposing the letter and the reference to the letter in the adverse action, Mitchell reduced her union activity until CSEA completed its investigation. (Case No. S-CE-452-S, paragraphs 4(i) and (1).)

In July 1990, the four-member CSEA committee issued its summary report.[31] It concluded that Mitchell had not intentionally violated the union's internal policy or constitution. The report reviewed the cautious and volatile history of interaction between Mitchell, CSEA, and FTB. At least 27 union representatives and members had been actively involved in resolving Mitchell's concerns. The report concluded that FTB caused many problems by its hard-line attitude. Moffett had succeeded in his representational efforts, however, and he and Mitchell now had a clear understanding of accountability. The recommendations included establishing a spirit of reasonable cooperation between the union and Mitchell, reminding her of the

[31]The summary stated that the full report was available for inspection at the CSEA headquarters office.

sensitive role of a CSEA agent, enhancing accountability between CSEA staff and union members, retaining Moffett as field staff for the FTB chapter and requiring Moffett and Mitchell to meet on a regular basis. Mitchell considered the report to be a full vindication of her claims.

On November 28, 1990, Mitchell requested SPB to file charges against the 26 employees signing the June petition, eight FTB managers named in her May open letter, Bush and Assistant Executive Officer Allen Hunter. Mitchell withdrew her request for charges against the 26 rank and file employees on December 3. She filed a second request for SPB action on December 1 against 12 FTB managers, including the LROs, security officer and personnel officer. Mitchell filed a third request with SPB against Eiserman alone on December 31.

Telephone Use

From late January through early May 1990, Hicks and Kerns telephoned Mitchell several times at work but were unable to reach her. They left messages each time. Hicks identified herself as a union steward but did not know the name of the message taker. Kerns did not identify herself as a steward but left her messages with Eiserman who gave her name. After Mitchell did not return their calls, both Hicks and Kerns contacted her at home and complained; Mitchell told them that she never received the messages.[32] Hicks protested to Alberti and

[32]Hicks and Kerns acknowledged that they could and did reach Mitchell at home to discuss union business.

the FTB LROs, which resolved the situation for the most part.

4.(During this time, Mitchell was receiving 20 calls and 10 messages per day at work.[33] Mitchell's failure to receive these messages required her to work faster to evaluate whether to file and/or respond to grievances because she had less time to consider them, but no grievances were denied on the grounds of being untimely filed. Mitchell also asked her coworkers if these were all of the messages when she received a number of them.

Kerns again had difficulty contacting Mitchell after she returned to work in the fall. From October 1990 through January 1991, Kerns left two to four messages for Mitchell at work which were not returned. They did communicate within a day or two of each message, however. The impact of the delayed contact was that an employee was required to wait for information; no grievance was denied or not filed because of failure to meet contractual timelines.

From January through March 1991, Kerns telephoned Mitchell three to four times a day about representation, grievance procedures and other information.[34] Kerns was then the chief job steward, and she filed 17 grievances in January alone. The majority of Kerns' messages were not returned immediately. She complained to Mitchell, who replied that she did not receive the messages. Kerns did not speak with Eiserman or anyone else in

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[33]Mitchell testified that she did not receive three or four messages from Hicks and Kerns during this time.

[34]Mitchell estimated receiving one to seven calls per week during this timeframe.

unit 07 about this. Kerns and Mitchell conceded that they reached each other within one to two days of each call. The consequence of Mitchell's failure to receive Kerns' messages was that responses to employees were delayed. No grievances were denied or not filed due to timeliness bars. Mitchell also had less time to evaluate whether a grievance should be filed by her or Kerns. (Case Nos. S-CE-452-S, paragraph 4(d) and S-CE-487-S, paragraph 4(1).)

Barbara Lemuel (Lemuel), a Tax Program Assistant at Sun Center, called Mitchell several times at work from April through October 1990 to seek representation.[35] She was told each time that Mitchell was not in the unit and her messages were not returned. Lemuel finally insisted that she needed to speak with Mitchell because her call was important. Mitchell came on the line immediately.

In February or March 1990, one of the unit telephones was relocated to a supervisor's desk while Mitchell was on union leave. Before the phone was moved, Mitchell could speak freely since it had been on an empty desk. Mitchell asked Eiserman why the phone was moved. Eiserman informed her that its prior location had disrupted the unit, requiring employees to leave their desks to answer calls. Mitchell thought "management was kidding" and returned the phone to the empty desk the next time she took a call. Eiserman told Mitchell that the phone was to stay on the supervisor's desk and not to move it again. Mitchell

[35]Lemuel joined CSEA in August 1990.

requested an informal meeting on the subject on March 14, and a grievance was later filed. The movement of the unit phone did not impede Mitchell's union activity; she was free to accept and make calls although in a location closer to a supervisor. Mitchell testified that the movement of the phone affected her interaction with coworkers because most incoming calls were for her and employees complained about answering her calls. The new placement of the phone was also three to five feet further from Mitchell's desk. (Case No. S-CE-452-S, paragraph 4(k).)

From March through May 1990, Eiserman allegedly told Mitchell not to use any unit telephone unless she was present and to ask permission before Mitchell made or accepted calls. This instruction was repeated one or two times a week. Mitchell was not denied permission to take calls. She responded to informational questions but did not handle ongoing grievances or adverse actions by phone at work. Mitchell did not request approval to place calls because she recorded representation-related calls on the FTB job steward logs and separately recorded her personal calls. While Mitchell was absent on NDI leave, Moffett discussed the matter with Eiserman in an informal meeting.[36] When Mitchell returned to work in October, the restriction was not enforced. As a result of Eiserman's directive, however, Mitchell testified that she conducted more union business at home, spending approximately three to four

[36]Moffett testified that employees must obtain permission from supervisors to use state phones for union business.

hours a night, because she did not make as many representation or union-related calls at work. (Case No. S-CE-452-S, paragraph 4(f).)

At a meeting in early January 1991, supervisors directed unit 07 employees to reduce their personal calls to five minutes because of the increased cost of telephone bills. Mitchell did not consider the five-minute limitation to apply to union-related calls because representation required more time to identify issues and calm employees. Mitchell and Eiserman did not discuss whether the five-minute limit applied to or excluded representation-related calls. On January 16, Mitchell received a telephone message, taken by Eiserman, from an aide to Assemblyman Phil Isenberg. On January 17, she received a message from an aide to Assemblywoman Gwen Moore which was taken by Naismith. That day, Mitchell returned these calls to inquire whether the Legislators would investigate the charges against FTB raised in Mitchell's May 1990 open letter. During her third call to Assemblywoman Moore's office, Eiserman allegedly told Mitchell to get off the phone. Mitchell testified that the aide overheard the comment and ended the conversation. Mitchell telephoned the Assemblywoman's aide later that day from home. A grievance was filed. The impact of this incident was the five-minute limitation on union phone calls.[37] (Case No. S-CE-487-S, paragraph 4(i).)

[37]This allegation was withdrawn by Mitchell, and incorporated in the April 25, 1991 notice of partial withdrawal, which accompanied the complaint in Case No. S-CE-487-S.

Use of Leave Time

In March 1990, Eiserman allegedly ordered Mitchell to "store up" leave credits on the books, which meant that she could not use accrued vacation or sick leave. The April 20 memorandum (memo) placing Mitchell on attendance restriction used the term "building up" leave credits.[38] Mitchell's 1990 attendance records show use of vacation and sick leave in March and April until she went on NDI leave. (Case No. S-CE-452-S, paragraph 4(r).)

On October 16, 1990, Mitchell was denied two hours of state time to travel to her deposition by FTB's attorney in her workers' compensation case. Mitchell worked from 6:00 a.m. to 2:30 p.m. and the deposition was scheduled at 3:00 p.m. in downtown Sacramento, a 30- to 45-minute drive from the Central Office. Eiserman did not release Mitchell at 12:30 p.m. as she requested. Mitchell testified that she was not late for her deposition, however, because she used two hours of vacation.[39] A letter from the FTB attorney confirmed Mitchell's attendance and that she met with her attorney before the deposition. Mitchell filed a grievance. The effect of this episode was that Mitchell's preparation of her own grievance took time away from other issues in which she could provide representation. (Case No. S-CE-452-S, paragraph 4(s).)

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[38] The April 20 memo was used to refresh Mitchell's recollection and was not introduced into evidence.

[39] Mitchell's October 1990 attendance record reflect that she was absent without leave (AWOL) for two hours that day.

On October 1, 1990, Eiserman allegedly informed Mitchell that she would allow her to use a 30-minute carryover vacation credit. On October *2,* Mitchell was absent from work, attending the SPB hearing in her appeal. She used the 30-minute credit on the morning of October 3. When Mitchell arrived at work that day, Eiserman told her that she was late. Mitchell reminded Eiserman of their agreement that she could use the 30-minute credit. Eiserman said nothing further. Their conversation was very short and Mitchell received no comments from her coworkers regarding it. Mitchell considered Eiserman's remark as a verbal reprimand and thought her image in the unit was adversely affected. (Case No. S-CE-452-S, paragraph 4(t).)

On November 13, 1990, Mitchell submitted a doctor's note and a laboratory note to support an absence earlier that month. Eiserman initially accepted the notes but denied them the next day, recording Mitchell as AWOL. Eiserman informed Mitchell that the doctor's forms were no longer acceptable because of her attendance restriction and a general explanation of her treatment and lab work were required. Mitchell resubmitted the notes with the necessary statements and they were accepted. At the time, Mitchell worked a four-hour day with four hours credited to NDI. According to Mitchell, the denial undermined her credibility as a steward, since other employees would be intimidated by a supervisor's rejection of the verification submitted by a job steward. On January 2, 1991, while still on attendance restriction, Mitchell gave Eiserman a doctor's note which was

rejected and she was marked AWOL. She resubmitted the note with the required statement and Eiserman accepted it. A second doctor's note with a bill was also approved that month. The initial denial made Mitchell less confident about her ability to effectively represent coworkers on the issue of medical verification. (Case No. S-CE-452-S, paragraph 4(v); Case No. S-CE-487-S, paragraphs 4(a) and (b).)

In late December 1990, CSEA requested union leave for Mitchell and Harris. On January 8, 1991, FTB LRO R. Mitchell wrote to Perry Kenny of CSEA, advising that 12 hours of paid union leave on January 9 through 11 were granted to Harris but denied to Mitchell for operational reasons. Mitchell then requested one day of union leave to attend a Labor-Management Conference at California State University, Sacramento on January 24;[40] Eiserman denied her request. Mitchell asked for personal leave or dock to attend the one-day conference. Eiserman again refused. Mitchell sought out FTB LRO R. Mitchell, reminding him that they both went to the conference last year and mentioning that she had already paid for it. On January 24, R. Mitchell wrote to Perry Kenny of CSEA, approving eight hours of paid leave for Mitchell that day, and Mitchell attended the conference on paid leave. Eiserman allegedly told Mitchell that she had denied her requests because she thought the conference was a CSEA function; once she learned otherwise, she approved

[40]Mitchell attended the conference in 1990. She had already paid the enrollment fee for the 1991 conference when she requested union leave to attend it.

union leave since Mitchell should not lose money. Mitchell also received paid union leave from February 11 through March 15. No adverse impact was offered other than Eiserman's statements. (Case No. S-CE-487-S, paragraphs 4(f) and 4(n).)

Other Representational Activity

In early March 1990, Eiserman allegedly informed Mitchell that "informals"[41] regarding Mitchell's own issues would be limited to 15 minutes. From March through May 1990, three informals with Eiserman concerning Mitchell personally were restricted to 15 minutes; the issues were her 100 percent review, tardiness, denial of adjusted work hours and use of sick leave. Harris acted as Mitchell's representative each time. At Mitchell's request, Harris asked Eiserman to waive further informals due to the time constraints but Eiserman would not agree. Eiserman told Harris that the informals for Mitchell would be confined to 15 minutes during the workday but could last longer if scheduled at the end of her shift. Mitchell declined this option because she did not want to conduct the informals on her own time when she was entitled to state time. Mitchell was allowed 30 minutes to one hour when representing employees outside unit 07 in informals.[42] Mitchell did not ask Eiserman to extend any of the three informals or continue them to a later

[41]Informals are meetings required with the immediate supervisors held before filing formal grievances. According to Mitchell, meetings are designated as informals when the employee or union representative so informs the supervisor.

[42]Harris testified that he was usually granted one hour for informals concerning employees other than Mitchell.

date. She and/or Harris were able to cover the issues at each informal but did not have time to present many details. A grievance was filed over the 15-minute limitation. As a result, Mitchell stopped asking for a representative and held informals with Eiserman one-on-one. According to Mitchell, she accomplished the same result by herself as with a representative, namely, no resolution of the issue. (Case No. S-CE-452-S, paragraph 4(e).)

On October 1, 1990,[43] Mitchell spent three to four hours in training with Chamberlain. She requested two hours state release time that day and four hours of release time on October 2 to meet with Moffett to prepare for the SPB hearing in her appeal. On October 3, Mitchell asked for a work shift change from her regular shift (6:00 a.m. to 2:30 p.m.) to 9:00 a.m. to 5:30 p.m. for the prior day, coinciding with the SPB hearing. Her requests were denied by Eiserman (October 1 two hours release time and October 3 work shift change) and R. Mitchell (October 2 four hours state time). Mitchell used vacation on October 1 and 2 to meet with Moffett which Eiserman approved.[44] In addition, Moffett requested eight hours to meet with Mitchell to prepare her appeal.[45] Eiserman told Moffett to break down the request into smaller increments, citing operational reasons. Moffett

[43]This was Mitchell's first day at work since May 4.

[44]Mitchell was on attendance restriction at the time.

[45]Moffett testified that the October 2 SPB hearing was held at FTB while Mitchell testified that the hearing was held in downtown Sacramento.

testified that he received four hours of release time, two hours on two occasions, which he and Mitchell used at the worksite. Eiserman also offered Mitchell release time on October 1 if she would remain at work; she rejected this alternative because Moffett could not come to FTB that day and she had been allowed state time away from the site to prepare her appeal from a previous adverse action.[46] A grievance was filed over the disallowance of state time and work shift change. These incidents required Mitchell to research the contract to determine if the denials were justified, which took time away from her representation of one or two employees. Mitchell did not identify the subjects of representation and names of employees, or specify the time she spent in research. (Case No. S-CE-452-S, paragraph 4(g).)

In late February 1990, Mitchell requested four hours of adjusted work hours/flex-time to attend CSEA civil service division meetings at Oakland, Los Angeles, and Millbrae the next month.[47] Mitchell desired four hours travel time on the Fridays before the weekend meetings.[48] Her request was denied. Mitchell used accrued leave and attended all three meetings. In early

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[46]In June 1988, Mitchell received an unspecified adverse action. She filed an appeal and the dispute was settled. Under the settlement, finalized in 1990, FTB withdrew the adverse action.

[47]Under an adjusted work schedule, any absences must be made up during the five-day workweek so that the required 40-hour week is completed.

[48]At the time, Mitchell worked a 6:00 a.m. to 2:30 p.m. shift.

March, Naismith and Eiserman approved a three-week adjusted work schedule for Mitchell from February 26 through March 16, one week at a time. Mitchell was absent on March 5, 6 and 7, however, and could not fulfill the schedule. Mitchell again sought adjusted work hours for the same period, which was denied based on her previous failure to meet the schedule.[49] A grievance was filed. As a consequence of the denial of adjusted time, Mitchell may have arrived late for one or more of the Friday evening meetings. (Case No. S-CE-452-S, paragraph 4(h).)

In mid-October 1990, Mitchell was limited to one 30-minute meeting with Moffett over five or six of her personal grievance issues; these included AWOLs, use of the unit telephone, denial of state release time to prepare for the October 2 SPB hearing, 100 percent review, and denial of representation by Harris. She and/or Moffett had requested one hour of state release time for their meeting. Eiserman offered Mitchell more time off after Chamberlain returned from surgery. A grievance was filed. The effect of the 30-minute limitation was that some timelines on issues were not met; Mitchell did not specify the timeframes or subjects. (Case No. S-CE-452-S, paragraph 4(p).)

On January 4, 1991, Mitchell telephoned Heather Mauck (Mauck), a FTB manager in a different section, to schedule a

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[49] The evidence is unclear whether Mitchell's request for four hours of adjusted time to travel was separate from or encompassed within the three-week schedule originally approved by her supervisors.

meeting[50] regarding an employee being rejected during probation.[51] Frieda Long (Long) had not yet been served with the notice but was aware she would be terminated. Mitchell complained that Mauck had only partially complied with her request for documents. Mauck allegedly refused to meet with her. Mitchell told Mauck that her action denied employee rights since she was Long's designated union representative.[52] Mauck replied that the FTB attorney and LROs informed her that she did not have to meet with Mitchell. After Mauck hung up, Mitchell telephoned LRO Jeannette Williams, who confirmed the advice. Mitchell later filed Long's appeal from rejection during probation with the SPB. This incident denied recognition to Mitchell as an employee's designated representative and Long's right to be represented by her chosen representative. (Case No. S-CE-487-S, paragraph 4(d).)

On January 9, 1991, Mitchell was served with a second adverse action of permanent demotion while at work. She and/or Moffett requested one hour of state release time to meet over the adverse action and her pending grievance over denial of state time to prepare for her October 1990 SPB hearing. Eiserman

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[50]Mitchell notified Eiserman that she planned to meet with Mauck and estimated the time of the meeting. Eiserman approved state release time for Mitchell to go to the meeting.

[51]Mitchell already knew that Mauck had asked Harris to serve as Long's representative in a meeting shortly before Christmas because Mitchell was absent from work and Long wanted representation over a review of her performance rating.

[52]Mitchell testified that Long signed a consent form designating her as the representative.

granted 30 minutes. Mitchell offered to work an extra hour in the afternoon to have a full hour. Her request was denied. Moffett testified that he asked Eiserman for more time and "probably" received it. A grievance was filed. This event was a continued reminder that Mitchell would not be allowed reasonable time for representation and could not be an effective steward. (Case No. S-CE-487-S, paragraphs 4(e), (g) and (h).)

On the afternoon of January 22, 1991, Kerns visited Mitchell in unit 07 to discuss an upcoming union meeting. Kerns was on her own time[53] and Mitchell was on her afternoon break.[54] Eiserman approached Kerns and Mitchell and told Mitchell to get back to work. Mitchell reminded Eiserman that she was on her break. Eiserman said that she forgot and left immediately. Kerns complained to Mitchell, but Mitchell told her not to worry and she would handle it. Kerns replied that she would leave at the end of the break. Kerns remained and discussed union business with Mitchell until almost the end of the 15-minute break, because Kerns had another meeting in the building. This episode had no impact on Mitchell's union activities other than Eiserman's failure to apologize for the interruption.

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[53]Kerns testified that before January 1991, she discussed union business with Mitchell at her desk on numerous occasions.

[54]Mitchell testified that she had no set time for her breaks, she usually took breaks at her desk, and Eiserman would not know she was on break unless she told her. Mitchell did not hold union meetings at her desk but did discuss union business or representation issues with fellow employees there. According to Mitchell, it was obvious that she was on break if she was talking to another employee at her desk.

(Case No. S-CE-487-S, paragraph 4(j) . )

From' January through March 1991, Eiserman allegedly interrupted Mitchell three other times while she was engaged in union business. On each occasion, Mitchell was on break and Eiserman told her to go back to work. While Mitchell discussed union business with Harris, Eiserman's remark interrupted their conversation without further effect. Another time, Mitchell was updating former coworker Cindy Brash on CSEA and unit 07 activities; their conversation ceased after Eiserman's statement. When Mitchell talked to Rita Cox about her SPB appeal, Eiserman's communication ended their discussion but Mitchell later provided Cox with the requested information. (Case No. S-CE-487-S, paragraph 4(m).)

Prior to August 1990,[55] Mitchell and Lemuel scheduled a meeting at Sun Center regarding Lemuel's job concerns. Lemuel requested time off in advance which was granted by her supervisor. When Mitchell met with Lemuel at the site, FTB management[56] told Mitchell that she had no right to be there, she was out of her boundaries, job stewards existed at the site who could help Lemuel and Mitchell should leave. Lemuel was very intimidated by these statements and the denial of Mitchell as her representative. Lemuel subsequently joined CSEA to ensure her right to union representation.

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[55]Mitchell was on full-time NDI leave at the time.

[56]Lemuel did not identify the individual(s).

Remaining Allegations

On September 6, 1990,[57] Mitchell requested a transfer to unit 06 (Correspondence Section, Taxpayers Services Bureau) at Sun Center. Mitchell cited her medical condition and harassment received in unit 07, including the June 1990 adverse action, telephone calls at home from unit 07 supervision inquiring about her disability and ability to return to work and the spring 1990 unit-wide meeting held in her absence. Mitchell emphasized her familiarity with unit 06 work and her positive relationship with the unit 06 supervisor. Although Mitchell would retain her steward position, she would not take on full representation responsibility due to health concerns and the availability of other stewards and Moffett; she would, however, need to use union leave fairly often as DLC 786 president. On September 18, Ogden denied the transfer. As grounds, Ogden stated that Mitchell's job performance needed improvement which would best be accomplished in her current assignment where she was already familiar with procedures, and a transfer would not satisfy Mitchell's concerns because all units have similar requirements of attendance, production and standards of quality. He declared that Mitchell's problems with current unit 07 supervision were the same as with past supervisors, notwithstanding a complete turnover at every level in the unit. Ogden found no compelling medical evidence of Mitchell's inability to perform her current duties or other medical necessity for the transfer. Once

[57]Mitchell was on NDI leave at the time.

Mitchell's performance questions were resolved, she could apply for transfer opportunities, however. On October 18, Mitchell delivered a letter from her doctor to Ogden. Doctor Warren advised that Mitchell's transfer should be approved because a return to the same environment and tension could end her progress and require a subsequent stress leave; he had examined the duties of both positions, found them similar, and Mitchell was familiar with the duties in the new unit. On October 25, Ogden again denied the transfer, referring to the reasons in his September 18 memo, although he understood Mitchell's desire for the transfer and her doctor's interest in supporting her. On November *2,* one week later, Mitchell began a four-hour workday. Mitchell was away from the unit for four hours a day and unavailable to provide representation as a result of the disapproval of her transfer. While on the reduced workday, she referred employees to Moffett for grievances and adverse actions, rescheduled meetings and limited her telephone calls. Mitchell also was not able to handle other employees' worksite problems due to her personal stress. (Case No. S-CE-452-S, paragraphs 4(m) and (n).)

On October 30 or 31, Mitchell asked to take a one-day effective time management class offered to FTB employees free of charge;[58] Eiserman denied her request. Eiserman allegedly told Mitchell that the class would benefit the union and Mitchell as a

[58]A FTB bulletin indicated that the class was offered three times in October. Mitchell, however, did not know when the class would be held. Mitchell also did not know if other unit 07 employees asked to take the class and/or were given permission to attend.

steward, and cited her reduced workday. The denial of this training opportunity had no impact on Mitchell's union activities. The decision, however, caused her additional personal stress because she was attempting to improve her work performance and use her time more productively, as directed by Eiserman. (Case No. S-CE-452-S, paragraph 4(o).)

In October 1990, Mitchell was allegedly not allowed to record nonproduction time on her time sheet when working with trainers and reviewers and for unit meetings. On October 1, Mitchell participated in training with Chamberlain. She spent time with reviewers in correcting her work product as part of the 100 percent review. The unit meetings involved time spent individually with Eiserman and/or with Eiserman and Naismith together.[60] Disallowing these activities meant that 50 to 100 percent of Mitchell's workday were not charged to production codes, which lowered her production rate.[61] Mitchell also received counseling memos criticizing her low production which were used to support the January 1991 adverse action.[62] A

[59]Mitchell requested the class two or three days before starting the reduced schedule.

[60]One unit 07 meeting attended by all staff was credited to nonproduction time, unlike the meetings between Mitchell and her supervisors.

[61]Mitchell did not know if other unit 07 coworkers, or any FTB employees, were given nonproduction time for these activities.

[62]Mitchell began to receive counseling memos in March 1990 concerning her production rate. She also had been discussing the general issue of production standards with FTB since May, and met again with FTB management on the subject when she returned to

grievance was filed. The denial of nonproduction time had a negative effect on Mitchell's discussions with FTB over the appropriate production rates and standards for establishing them, Mitchell was less credible as a representative and the production rates/standards issues were not resolved. (Case No. S-CE-452-S, paragraph 4(q).)

On October 31, 1990, Mitchell was allegedly denied two hours of nonproduction time which she spent taking pictures of costumed children and co-workers. For several years, Mitchell had taken such pictures and posted them on a worksite bulletin board; the cost was borne by DLC 786. She learned that the two hours had not been credited to nonproduction time when she reviewed her timesheet.[63] Mitchell decided that she would no longer take pictures in the unit to avoid jeopardizing her production rate. (Case No. S-CE-452-S, paragraph 4(u).)

On two or three occasions, from October 1990 through January 1991, Eiserman allegedly told Mitchell that FTB would terminate her by adverse action. There were no other witnesses to these conversations. The first incident occurred in early October. Although the June 1990 adverse action imposed a three-month reduction in her salary, that period expired on September 30, before Mitchell returned to work. As a result, Mitchell's

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work in October. These discussions addressed how production rates were established as well as the specific recording of Mitchell's worktime.

[63]Mitchell did not know whether other FTB employees were allowed nonproduction time to take such pictures.

'October monthly salary was not reduced.[64] Eiserman told Mitchell that she had not suffered any penalty despite the adverse action. The second communication occurred in January after Mitchell received the second adverse action when Mitchell requested state time to complete an application for a promotional exam. Eiserman replied that Mitchell had been demoted, did not qualify for the position, and she would not be here anyway. Mitchell did not recall any specifics regarding a third exchange. These communications detracted from Mitchell's ability to represent employees with confidence and successfully resolve their disputes in similar areas. The conversations were also detrimental to her mental state and she stopped applying for promotional opportunities. (Case No. S-CE-487-S, paragraph 4(c).)

On the afternoon of January 31, 1991, Mitchell requested state time to obtain and complete promotional applications for a Program Technician II job and another advertised position. Eiserman denied the request for state time.[65] Mitchell did not submit the application because she could not complete it by the final filing date the next day.[66] Since promotional prospects for FTB job stewards are limited, according to Mitchell, the

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[64]Mitchell was off work on NDI leave during the entire three months covered by the adverse action. The NDI benefits received by Mitchell had a weekly maximum of $135, a sum far less than the 10 percent salary reduction would have required.

[65]Mitchell testified that state time was allowed in the past to complete promotional applications for Office Technician positions.

[66]At the time, Mitchell's shift ended at 3:30 p.m. The FTB personnel office closed at 4:00 p.m.

denial of any opportunity necessarily affects union activity. Case No. S-CE-487-S, paragraph 4(k).)

On February 8, 1991, Mitchell participated in a one-hour meeting with Eiserman, Naismith and Moffett. The meeting was to discuss a grievance filed by Mitchell over production rates. Topics covered were existing unit 07 workloads resulting from reorganizations, mergers and unit split-offs; production rates and established standards; whether test periods had been met; work procedures; and specific employee assignments. The FTB representatives asked for an extension of time to research and supply information requested by CSEA which Mitchell granted. After the meeting, Mitchell found a February 6 corrective memo from Eiserman on her desk.[67] The memo cited six accounts which Mitchell returned on February 5 without completing or following Eiserman's instructions on how to resolve them; it also stated that Mitchell had added notes to the accounts describing how she thought the accounts should be processed. Eiserman declared that Mitchell's refusal to follow instructions constituted insubordination and could result in adverse action. Mitchell wrote a note on the memo and returned it to Eiserman; she asserted that the memo invalidated Eiserman's request for an extension of time at the meeting, constituted a response to the production standards grievance, and a grievance would be filed.[68]

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[67]Mitchell's attendance records reflect that she used eight hours of sick leave on February 7.

[68]Mitchell filed a separate grievance over the corrective memo.

On March 5, another meeting was held over production standards; in attendance were those participating in the February 8 meeting, CSEA representative Bill Sweeney, FTB manager Elise Marendt, and FTB LRO R. Mitchell. Prior to the meeting, Mitchell supplied written confirmation of her request for information to FTB; the information was not given to CSEA at the March meeting, however, and the production standards grievance was elevated to the next level. Mitchell testified that the corrective memo stopped the grievance process and meet and confer sessions between CSEA and FTB on the production rate issue.

Other Evidence[69]

James Jiminez (Jiminez)[70] testified that in April or May 1990, Ogden suggested that he find another position. This comment came after Jiminez told Ogden he had contacted CSEA over the termination of his limited term position. Mitchell was not mentioned during this alleged conversation.

Barbara Howard (Howard), a CSEA member and FTB mailing machine operator, works a swing shift. In 1989, Howard attended steward training but did not complete it.[71] She received

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[69]During the five-day formal hearing, Charging Parties called 13 witnesses and one witness testified for Respondent. In addition to the testimony of Mitchell, Moffett, Harris, Hicks, Kerns, Jefferson, Rowland, Rogers and Lemuel, Charging Parties presented 47 documents and Respondent introduced 16 exhibits; all were received into evidence.

[70]Jimenez was a phase two witness. He was called out of turn to preserve evidence, due to his medical condition.

[71]Mitchell testified that Howard was a steward afraid to be active for fear of retaliation by FTB.

Mitchell's open letter at home. Howard telephoned Mitchell for advice on job issues or problems; when she could not reach her, Howard contacted Moffett for assistance and was always able to reach him. Howard saw no change in Mitchell's union-related activity from 1989 to 1990.

Cathy Casey (Casey) is a permanent intermittent Tax Program Assistant in the FTB Bank and Corporation unit. Moffett recruited her as a steward in June 1990. Casey did not complete steward training because of what she heard about Mitchell and her personal situation at work. Casey had barely passed probation, was on attendance restriction and a supervisor told her not to make any more waves. She filed a grievance over denial of her merit salary adjustment (MSA) which Moffett handled; the grievance was resolved in Casey's favor by the unit manager.[72] Casey could not identify the open letter.

Marcel Mills (Mills) is a supervisor in the Taxpayer Information unit at FTB; he is not a CSEA member. He saw the open letter and spoke with coworkers about it. Mills had heard negative comments about Mitchell from FTB managers but still decided to seek her out in September 1990 to correct racial imbalances at the workplace. His working relationship with Mitchell on this project has been very positive.

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[72]Casey's MSA was granted two months after it was due but she did not receive retroactive pay. A negative performance memo regarding failure to meet production rates also was removed from her personnel file.

Carol Pena (Pena) is a Tax Program Assistant in unit 07.[73] In 1991, Pena decided not to become a steward because one or two of her coworkers had filed grievances which lacked merit. Pena's workload was also very heavy and she did not have time to represent other employees. Pena may resume steward training in the future.

Respondent cross-examined Moffett regarding its partial motion to dismiss specified allegations in Case No. S-CE-452-S. Moffett met with FTB counsel Jeffrey Fine (Fine) on May 3, 1991. At the time, he represented Mitchell on all three cases. Moffett indicated that he would not pursue certain allegations, identified other charges that he would tentatively drop but needed to discuss with Mitchell first, and named other claims that would not be dismissed. On May 9, Fine wrote to Moffett and confirmed their meeting; Moffett testified that Fine's letter was substantially accurate.[74] Moffett was unaware of any limitation on his authority or ability to reach agreement on case strategy for the three complaints as of May 3. On May 4, the CSEA civil service division replaced Moffett as representative in the cases with outside counsel. Mitchell told Moffett that she intended to file an amended notice of appearance designating herself as co-counsel on the two charges she filed, but Moffett was unsure

[73]Mitchell testified that Pena had declined to be a CSEA job steward because of FTB actions against Mitchell.

[74]Case No. S-CE-452-S, paragraphs 4(k), (m), (n), (q), (r), (s), (t) and (u) were the charges which Moffett agreed to drop.

whether their conversation took place before or after the May 3 meeting.

ISSUE

Did any of the 37 alleged employer actions interfere with or deny rights to the union in violation of Dills Act section 3519(b)?

DISCUSSION

The sole issue is whether any alleged violations of CSEA's section 3519(b) rights have been established by a preponderance of the evidence. This determination cannot be made in a vacuum.

First, consideration must be given to the deferral of the section 3519(a) allegations concerning Mitchell's rights as an employee, based on the same charged employer conduct.

PERB precedent establishes that the mandatory language of Educational Employment Relations Act (EERA)[75] section 3541.5(a)(2) constitutes a nonwaivable jurisdictional rule requiring dismissal of a charge (and complaint) and its deferral to arbitration if the statutory conditions are met. (Lake Elsinore School District (1987) PERB Decision No. 646, aff'd. Elsinore Valley Education Association, CTA/NEA v. PERB (1988) Cal.App.4th, Div.2, Case No. E005078 [nonpubl. opn.]; Eureka City School District (1988) PERB Decision No. 702; Alameda County Superintendent of Schools (1989) PERB Decision No. 747.) The Board's exercise of jurisdiction is not precluded, however,

[75]The EERA is codified at section 3540 et seq. and is also administered by PERB.

unless the alleged unfair practice is also prohibited by the parties contract, the agreement culminates in binding arbitration and the grievance machinery covers the matter at issue. (Los Angeles Unified School District (1990) PERB Decision No. 860, aff'd. Los Angeles Unified School District v. PERB (1991) Cal.App.2nd, Div.l, Case No. B057193 [nonpubl. opn.]) Since Dills Act section 3514.5(a)(2) is identical to EERA section 3541.5(a)(2), the Board has held that where the contract prohibits only the violation of employee rights, and not those of the exclusive representative, only the section (a) charge may be deferred. (State of California (Department of Parks and Recreation) (1990) PERB Decision Nos. 810-S and 810a-S; State of California (Department of Forestry and Fire Protection) (1989) PERB Decision Nos. 734-S and 734a-S; San Diego County Office of Education (1991) PERB Decision No. 880.)

The separate and independent Dills Act section 3519(b) allegation is more than a mere technicality. The statutory scheme directly confers benefits upon both employees and exclusive representatives, which includes the distinct right(s), respectively, to be free from unlawful employer practices. (North Sacramento School District (1982) PERB Decision No. 264.) The Board has found a section (b) violation where the employer's conduct interfered with, or tended to interfere with, the union's ability and right to represent bargaining unit employees. (San Francisco Unified School District (1978) PERB Decision No. 75; Santa Monica Community College District (1979) PERB Decision

No. 103.) Thus, PERB may exercise jurisdiction and remedy unfair practices against employee organizations even though the conduct is primarily directed toward bargaining unit employees.

Mitchell's activities as a job steward and DLC 786 president from January 1990 through March 1991 must be evaluated, therefore, in light of the statutory conditions for deferral and her arguable position as an agent of the union. (Antelope Valley Community College District (1979) PERB Decision No. 97; Los Angeles Community College District (1982) PERB Decision No. 252; Inglewood Unified School District (1990) PERB Decision No. 792, aff'd. Inglewood Teachers Association, CTA/NEA v. PERB (1991) 227 Cal.App.d 767 [278 Cal.Rptr. 228])

Here, the applicable contract contained a grievance procedure, culminating in binding arbitration, which both CSEA and bargaining unit employees could invoke. Furthermore, the agreement prohibited employer reprisals against both employees and job stewards, and entitled employees and stewards/union officers to reasonable state release time and reasonable use of state telephones for representational activities. Fully utilizing the contractual machinery, Mitchell and/or CSEA, on her behalf, filed grievances concerning 14 of the 37 allegations[76] in the consolidated complaints.[77] Even assuming the validity of

[76]Grievances were filed over the conduct charged in Case No. S-CE-452-S, paragraphs 4(a), (b), (c), (e), (g), (h), (j), (k), (p), (q) and (s), and regarding the allegations in Case No. S-CE-487-S, paragraphs 4(g), (i) and (o).

[77]Respondent's motion to dismiss the section 3519(b) complaints and defer them to arbitration, made prior to hearing

these claims of employer misconduct, the evidence does not establish harm to or denial of CSEA rights, separate and apart from any FTB actions involving or directed to Mitchell as an employee, or as a union officer or job steward, which cannot arguably be addressed by an arbitrator in resolving the grievances.[78] These 14 allegations therefore must be dismissed and deferred to arbitration.

The evidence in support of the remaining 23 contentions, again assuming arguendo their truth, does not demonstrate that the FTB conduct toward Mitchell intimidated other employees from involvement in the union, prevented representation of employees by CSEA and harmed or otherwise interfered with the union's rights under section 3519(b). Grievances were neither denied as untimely nor left unfiled due to Mitchell's failure to receive messages from other job stewards; at most, there was a one- to two-day delay in communications between Mitchell and Hicks or Kerns and their follow-up responses to employees.[79] Any interruptions by Eiserman in worksite conversations between Mitchell and stewards or coworkers were short in time and had no lasting effect; the communications were either completed as soon

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and before the presentation of any evidence, was premised on the contract language alone.

[78]This finding is without prejudice to Charging Parties' ability to secure a post-arbitration review of any arbitration award, based on a repugnancy standard. (San Diego County Office of Education (1991) PERB Decision No. 880.)

[79]Case No. S-CE-452-S, paragraph 4(d) and Case No. S-CE-487-S, paragraph 4(1).

as Eiserman left or Mitchell later provided the information requested.[80]

Mitchell admitted that the alleged directive precluding her use of the unit telephone except when Eiserman was present did not impede her union-related activities; she was free to take and place calls and, in any event, the limitation was rescinded after October 1990.[81] The refusal of Mauck to meet did not prevent Mitchell from filing a timely SPB appeal of Long's rejection from probation, while the communication between FTB supervision and Mitchell over her representation of Lemuel ultimately benefitted the union since Lemuel joined CSEA.[82] Any denials of or restrictions upon Mitchell's requests for state release time and/or sick, vacation or union leave were either not enforced, rescinded, or Mitchell was given the time when she complied with her supervisor's instructions.[83] Although FTB denied CSEA-requested union leave for Mitchell, state release time was granted to Harris; there is no evidence that CSEA required both

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[80]Case No. S-CE-487-S, paragraph 4(j) and (m).

[81]Case No. S-CE-452-S, paragraph 4(f).

[82]In addition, these allegations (Case No. S-CE-487-S, paragraph 4(d)) invoke Mitchell's steward representation rights and Long's and Lemuel's rights to representation as employees, which are set forth in article 2 of the contract and must be deferred.

[83]Case No. S-CE-452-S, paragraphs 4(r), (t) and (v); Case No. S-CE-487-S, paragraphs 4(a), (b), (f), and (n).

employees to perform union work or was harmed by FTB's release of only one steward/officer.[84]

The denials of Mitchell's requested transfer, training opportunity, nonproduction time on Halloween and state time to complete promotional applications[85] had no negative impact upon CSEA separate and distinct from their effect upon Mitchell personally. To the extent that Ogden's refusal to approve the transfer resulted in Mitchell's absence from the worksite, she took remedial steps to cover and complete any representational activity in progress, such as referring employees to Moffett, rescheduling meetings and making telephone calls from home. Mitchell's testimony that she would take no pictures on future Halloweens and denial of any promotional opportunity to a steward necessarily implicates union activity is speculative and does not support a finding of interference with CSEA's rights.

Several allegations are based upon Mitchell's testimony that the incidents caused her to lose confidence in her ability to be an effective union officer and represent employees with similar problems.[86] Notwithstanding her self-doubts, the evidence establishes that Mitchell did not cease or significantly restrict her union-related activities, but instead took union leave,[87]

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[84]Case No. S-CE-487-S, paragraph 4(n).

[85]Case No. S-CE-452-S, paragraphs 4(m), (n), (o), and (u); Case No. S-CE-487-S, paragraph 4(k).

[86]Case No. S-CE-487-S, paragraph 4(c).

[87]Mitchell took 200 hours of union leave in the first three months of 1991 until she started NDI leave on March 22.

made a number of telephone calls and participated in many meetings in 1990 and 1991 for the purpose of representation.

The two adverse actions against Mitchell were timely-appealed to SPB, the appropriate forum for deciding whether the factual allegations constitute cause for discipline.[88] The January 1991 demotion is pending before the SPB and Mitchell withdrew her appeal from the June 1990 salary reduction, thereby terminating the case.

Mitchell testified that the FTB actions caused her such stress that she became ill, which required her absence from the worksite and, as a consequence, reduced the time in which she could provide onsite representation. PERB does not have jurisdiction to decide whether Mitchell's injuries were incurred in the course of her employment. The Workers Compensation Appeals Board is the appropriate forum for adjudicating such claims, and Mitchell has invoked this remedy. Furthermore, the evidence demonstrates that while absent from work on NDI leave, Mitchell conducted union business at home and was accessible to stewards and employees by telephone. The evidence also shows that CSEA staffer Moffett and job stewards/chapter officers Harris, Hicks, and Kerns were active and available presences at the worksite, provided representation to employees, and were afforded liberal amounts of state release time for representation so as to compensate for any unavailability by Mitchell.

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[88]Case No. S-CE-452-S, paragraphs 4(i) and (1); Case No. S-CE-487-S, paragraph 4(h).

Mitchell's May 1990 open letter produced mixed results, with some CSEA members resigning in protest and other FTB employees joining the union for representation. It is undisputed that the letter generated an increased visibility for CSEA job stewards at FTB. Any harm and/or controversy sustained by the union cannot be charged to FTB, however, but must be attributed to Mitchell as the source of the letter.

Mitchell's own testimony concerning the production standards meeting/corrective memo[89] illustrates unequivocally that the alleged section 3519(b) violations of CSEA's rights have no independent foundation. Rather, they are inexorably linked to her section 3519(a) claims as an employee to represent herself and/or be represented by a CSEA representative, which were dismissed and deferred to arbitration.[90] These and other

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[89]Case No. S-CE-487-S, paragraph 4(o).

[90]

> Q. (Fine) And my question was, to you, that meeting concerned the larger questions and was not particular just to you. Isn't that right? It wasn't your particular problem, is that correct?
> . . . . . .
>
> A. (Mitchell) I want to hear you say what it was concerning.
>
> Q. I don't remember all you said. Production rates, different work rates for different types of things in the unit, different changes that have taken place and their effect on work rates and so forth. Isn't that what it was about in your words?
>
> A. All of the above and what I've said previously.

Q. Right. And that's distinct from a specific problem and how it specifically impacts Marilyn Mitchell.

A. No, it's not.

Q. Isn't that correct?

A. No, it's not.

Q. Oh, it isn't. Okay. So, it's fair to say, then, that the meeting you had with Nancy Eiserman and Wendy was the same as any other kind of meeting you would have had about a particular problem that you, yourself, are having, no different?

A. What? Do you want to separate me as an employee being represented and as a steward representing? Is that what you're after?

Q. No, I want to make a distinction between this is my problem as Marilyn Mitchell, and this is a larger problem that I observed going on in the work place.

A. I cannot give you any further information than what I've given you.

. . . . . .

A. We have reached impasse. I'm sorry.

Q. You cannot make that distinction.

A. And maybe that's what happened to us in March. When all of us met, we reached impasse.

. . . . . .

A. That's why we're pending arbitration now.

Q. Just answer my question. You cannot make a distinction in your mind between a problem that's personal to you, that you're experiencing, and a larger problem that has a different effect on working conditions in the unit.

allegations simultaneously invoke Mitchell's right to represent herself and/or other employees in workplace issues, and are inseparable from her entitlements as a job steward; these too are rights which are specified in the unit 4 contract, covered by the grievance machinery and subject to jurisdictional deferral.

Not as many DLC 786 meetings were held in 1991 due to Mitchell's absences from work,[91] since she usually organized the meetings. No further evidence was presented regarding the impact of less frequent chapter meetings upon the union. Given the availability of CSEA paid staff, job stewards, chapter officers, and even Mitchell herself at home, to answer questions and provide information about the union, as well as the lack of PERB jurisdiction to determine whether Mitchell's absences were caused by her employment, this fact, without more, is insufficient to establish interference with CSEA's rights in violation of Dills Act section 3519(b).

## CONCLUSION

It is apparent that Mitchell perceives no meaningful division between her roles as a FTB employee, job steward and DLC 786 president, and the effect upon CSEA of any interaction between FTB personnel and herself. There is no doubt about the sincerity of her convictions. Mitchell's section 3519(a) claims

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A. They are one and the same, you can't separate them.

[91]Mitchell was on NDI leave from May through September in 1990, and worked a four-hour day in November and December. She has been on NDI leave since March 22, 1991.

as an employee have been dismissed and deferred to arbitration, however, and her representation-related contentions are subject to the same jurisdictional rule, given the contract language.

Charging Parties have either failed to establish a nexus between the incidents alleged in the three consolidated complaints, and any interference with or denial of the union's Dills Act rights to represent the bargaining unit, or the allegations are subject to mandatory jurisdictional deferral to arbitration. FTB's motion to dismiss the complaints based upon deferral is granted for the allegations upon which grievances have been filed and those concerning employee, steward and/or union officer rights specifically addressed in the contract. The remaining claims of employer interference with union rights fail for lack of supporting evidence. Respondent's motion for partial dismissal of the charges is moot. Accordingly, the complaints alleging violation of Dills Act section 3519(b) are not supported by a preponderance of the evidence and must be dismissed.[92]

## PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in these consolidated matters, Unfair Practice Charge Nos. S-CE-452-S, S-CE-459-S and S-CE-487-S, and their companion complaints entitled Marilyn Mitchell v. State of California (Franchise Tax Board) and California State Employees

[92] This conclusion is without prejudice to Charging Parties' ability to secure post-arbitration review of any award in accordance with the statutory jurisdiction of the Board, and to pursue other legal remedies in the appropriate forums.

Association v. State of California (Franchise Tax Board) are hereby DISMISSED and the scheduled February 24-26, 1992 hearing CANCELLED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: January 10, 1992

Christine A. Bologna
Administrative Law Judge